Supreme Court U.S.
FILED
DEC 12 2000
OFFICE OF THE CLERK

No. 00-971

In The

Supreme Court of the United States

ARNOLD J. MORRIS, JR.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Does due process require that a person convicted of a criminal offense be granted a new trial when there is uncontroverted evidence in the record establishing that a juror did not follow the trial court's instructions concerning the constitutionally mandated presumption of innocence and the State's burden of proof, but instead, held the citizen accused to the burden of proving his innocence?

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OPINION BELOW

In an unpublished Opinion issued February 24, 2000, the Court of Appeals for the Eleventh Judicial District of Texas affirmed Petitioner's conviction for driving while intoxicated. *See Morris v. State*, No. 11-97-333-CR, slip op. (Tex. App. – Eastland, February 24, 2000) (not designated for publication). This opinion is reproduced in Appendix A to this Petition.

Also on February 24, 2000, the court of appeals overruled Petitioner's Motion for Rehearing. The letter notifying counsel that the Motion for Rehearing had been overruled is reproduced in Appendix B to this Petition.

The Order of the Texas Court of Criminal Appeals refusing Petitioner's Petition for Discretionary Review was entered September 13, 2000. This unpublished Order is reproduced in Appendix C to this Petition.

JURISDICTION

The Texas Court of Criminal Appeals is the highest court in Texas that hears criminal cases. On September 13, 2000, the Court of Criminal Appeals refused to grant discretionary review to examine the issue of whether Petitioner's due process rights were violated. This issue was decided adversely to Petitioner in the lower appellate court, the Court of Appeals for the Eleventh Judicial District of Texas, on February 24, 2000. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND RULES

The Fourteenth Amendment to the United States Constitution provides:

> . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1.

Section 1257 of Title 28 of the United States Code provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> . . . .

28 U.S.C.A. § 1257 (West 1993).

Section 49.01 of the Texas Penal Code provides:

> In this chapter:
>
> (1) "Alcohol concentration" means the number of grams of alcohol per:
>
> (A) 210 liters of breath;
>
> (B) 100 milliliters of blood; or
>
> (C) 67 milliliters of urine.
>
> (2) "Intoxicated" means:
>
> (A) not having the normal use of mental or physical faculties by reason of the

> introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body; or
>
> (B) having an alcohol concentration of 0.08 or more.
>
> . . . .

TEX. PENAL CODE ANN. § 49.01 (Vernon Supp. 2001).

Section 49.04 of the Texas Penal Code provides:

> (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
>
> (b) Except as provided by Subsection (c) . . . , an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.
>
> (c) If it is shown on the trial of an offense under this section that at the time of the offense the person operating the motor vehicle had an open container of alcohol in the person's immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.

TEX. PENAL CODE ANN. § 49.04 (Vernon Supp. 2001).

Rule 103(a) of the Texas Rules of Evidence provides:

> **(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection

> or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . . .

TEX. R. EVID. 103(a).

Rule 105 of the Texas Rules of Evidence provides:

> **(a) Limiting Instruction.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.
>
> **(b) Offering Evidence for Limited Purpose.** When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.

TEX. R. EVID. 105.

Rule 606(b) of the Texas Rules of Evidence provides:

> **(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may

> a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

TEX. R. EVID. 606(b).

Former Rule 606(b) of the Texas Rules of Criminal Evidence provided:

> **(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify as to any matter relevant to the validity of the verdict or indictment. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

TEX. R. CRIM. EVID. 606(b) (repealed) (current version at TEX. R. EVID. 606(b)).

Federal Rule of Evidence 606(b) provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the

> effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

Texas Rule of Appellate Procedure 21 provides:

> **21.1. Definition.** *New trial* means the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt.
>
> **21.2. When Motion for New Trial Required.** A Motion for New Trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record.
>
> **21.3. Grounds.** The defendant must be granted a new trial for any of the following reasons:
>
> . . . .
>
> (g) when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial; or
>
> . . . .

. . . .

21.8. Court's Ruling.

. . . .

(b) Ruling. In ruling on a Motion for New Trial, the court must not summarize, discuss, or comment on evidence. . . .

TEX. R. APP. P. 21.

STATEMENT OF THE CASE

This case presents the question of whether due process requires a state trial court to grant a new trial when the uncontroverted evidence establishes that a juror wholly failed to apply the presumption of innocence and convicted the accused because he had not proven his innocence.

I. The Facts

A. The Offense

Petitioner was convicted by a Dallas County, Texas, jury of the Class B misdemeanor offense driving while intoxicated. *See* TEX. PENAL CODE ANN. §§ 49.01(2), 49.04 (Vernon Supp. 2001). Petitioner testified that he had been asleep until 1:00 a.m. when he was called to go pick up a friend from a party. Petitioner further testified that he took a few sips of red wine from a cup the friend brought from the party, but had nothing else to drink that night.

According to the arresting officer, Petitioner was stopped for crossing over to the shoulder and back into

the center lane of the road. The officer further testified that Petitioner smelled of alcohol, had to use the door for support as he exited the car, and failed two field sobriety tests. However, the officer testified unequivocally that, on the videotape taken at the intoxilizer room in the police station less than an hour after arrest, Petitioner appears to be sober, having normal use of his mental and physical faculties. Further, because of the absorption rate of alcohol, the officer would have expected Petitioner to be more intoxicated at the time the videotape was made rather than less intoxicated.

B. The Jury Charge

With regard to the presumption of innocence and the burden of proof, the trial court instructed the jury as follows:

> In all criminal cases the burden of proof is on the State. All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or otherwise charged with the offense gives rise to no inference of guilt at his or her trial. The law does not require a defendant to prove his or her innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case. The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged

beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his or her own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not guilty".

[C.R.[1] 89-90]

C. The Hearing on the Motion for New Trial

Petitioner timely filed a Motion for New Trial on July 18, 1997, [C.R. 98] and an Amended Motion for New Trial

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[1] Hereinafter, the abbreviation "C.R." will be used to refer to the "Clerk's Record" or "Transcript" portion of the appellate record below.

on August 19, 1997. [C.R. 99-100] *See* TEX. R. APP. P. 21. The Amended Motion for New Trial alleged that "[t]he jury has engaged in misconduct to the extent that the accused has not received a fair and impartial trial."[C.R. 100]

On September 18, 1997, the trial court conducted a hearing on Petitioner's Motion for New Trial. During this hearing, one of the jurors from Petitioner's trial, Stella Louise Brackens Fryer, testified as follows:

> [Petitioner's trial counsel]: And you told us at that time that one of the things that the jury discussed and that weighed heavily against us was [Petitioner's] refusal to perform some tests that the police asked him to perform?
>
> [juror Fryer]: Correct.
>
> [Petitioner's trial counsel]: And you said kind of, by him not taking the tests, that showed you that he was guilty?
>
> [juror Fryer]: *Well, I felt like that he should have to prove his innocence. Yes, I felt like he should.*
>
> [Petitioner's trial counsel]: In fact, that's the next thing that you told me. *Specifically, you said that, if he was innocent that he should have gone on and proved that he was innocent?*
>
> [juror Fryer]: *Yes.*
>
> [Petitioner's trial counsel]: *And you still feel that way today?*
>
> [juror Fryer]: *Yes.*

[1 R.R.[2] (Motion for New Trial) 4-5 (emphasis added)]. The State did not object to this testimony on any grounds. The State did, however, elicit testimony from juror Fryer that, considering all of the evidence, she believed that Petitioner was guilty beyond a reasonable doubt. [1 R.R. (Motion for New Trial) 5]

The state wholly failed to elicit testimony, from juror Fryer or from any other source, that juror Fryer correctly applied the trial court's instructions concerning the presumption of innocence and the burden of proof. Thus, juror Fryer's testimony that she "felt like that [Petitioner] should have to prove his innocence" is uncontroverted in the record.

II. Proceedings Below

After the evidentiary portion of the hearing on the Motion for New Trial, Petitioner's trial counsel argued to the trial judge that a new trial was required because the evidence established that juror Fryer had disregarded the Constitutionally-required instructions on the presumption of innocence and the State's burden of proof. [1 R.R. (Motion for New Trial) 7-8] Petitioner's trial counsel analogized this situation to one where a juror admits to considering a defendant's failure to testify as evidence in violation of the Fifth Amendment. [1 R.R. (Motion for New Trial) 8-9] Without entering any findings of fact or discussing her reasoning, the trial court denied the

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[2] Hereinafter, the abbreviation "R.R." will be used to refer to the "Reporter's Record" portion of the appellate record below.

Motion for New Trial. [1 R.R. (Motion for New Trial) 10] *See* TEX. R. APP. P. 21.8(b) ("In ruling on a Motion for New Trial, the court must not summarize, discuss, or comment on evidence.").

Petitioner appealed his conviction to the Court of Appeals for the Eleventh Judicial District of Texas. One of the grounds for appeal was that the trial court erred by failing to grant the Motion for New Trial because the jury ignored the court's charge on the presumption of innocence. *See Morris*, slip op. at 3.

In an unpublished opinion issued February 24, 2000, the court of appeals denied relief on this ground, holding that because juror Fryer "considered all of the evidence and that she believed appellant was guilty of driving while intoxicated beyond a reasonable doubt," the trial court did not abuse its discretion in denying the Motion for New Trial. *See id.* at 4.

The court of appeals overruled Petitioner's Motion for Rehearing, and Petitioner timely filed a Petition for Discretionary Review with the Texas Court of Criminal Appeals. The Petition was refused September 13, 2000.

REASONS FOR GRANTING CERTIORARI

This case presents a unique situation: uncontroverted testimony in the record establishes that a juror in Petitioner's trial did not abide the trial court's instructions concerning the Constitutionally-mandated presumption of innocence and the State's burden of proof. This Court has never addressed the issue of whether due process

requires the granting of a new trial when an uncontroverted record establishes facts such as these. This Court should grant certiorari to resolve this novel issue of Constitutional law.

I. Texas Law Concerning Impeaching a Jury Verdict With Juror Testimony

The State did not object to Juror Fryer's testimony concerning her view of the presumption of innocence and burden of proof on any grounds. As a matter of Texas law, once evidence is admitted without an objection or requested limiting instruction, the evidence becomes part of the general evidence and may be used as relevant proof. *See* TEX. R. EVID. 103(a)(1) (party must make timely and specific objection to preserve error for appeal); TEX. R. EVID. 105(a) (party must request limiting instruction to preserve error for appeal); *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1021 (1995) ("a party opposing evidence has the burden of objecting and requesting the limiting instruction at the introduction of the evidence").

Accordingly, "once evidence is received without a proper limiting instruction, it becomes part of the general evidence in the case and may be used as proof to the full extent of its rational persuasive power." *See Garcia*, 887 S.W.2d at 878. Further, "the fact that evidence might have been inadmissible for certain purposes if the proper objection had been made does not limit its use." *See id.* at 878-79.

At the time of the hearing in this matter, Texas Rule of Criminal Evidence 606(b) provided for juror testimony

"as to any matter relevant to the validity of the verdict or indictment." *See* TEX. R. CRIM. EVID. 606(b) (repealed) (current version at TEX. R. EVID. 606(b)).[3] This rule was interpreted to allow jurors to testify concerning Constitutionally improper considerations by jurors during deliberations. *See, e.g., Reyna v. State*, 846 S.W.2d 498, 501 (Tex. App. – Corpus Christi 1993, no pet.) (reversing conviction where uncontroverted evidence established that jurors improperly considered defendant's failure to testify); *Lee v. State*, 775 S.W.2d 59, 64 (Tex. App. – Houston[1st Dist.] 1989), *vacated on other grounds*, 791 S.W.2d 141 (Tex. Crim. App. 1990), *op. on remand*, 816 S.W.2d 515 (Tex. App. – Houston[1st Dist.] 1991, pet. ref'd) (reversing conviction where uncontroverted evidence established that juror improperly considered defendant's failure to testify); *see generally*, David A. Schlueter, *The New Texas Rules of Evidence: Changes Affecting Criminal Cases*, 61 TEX. B.J. 458, 459 (1998).

Thus, at the time of Petitioner's trial and the hearing on the Motion for New Trial, juror Fryer's testimony was

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[3] A few months after the new trial hearing in this case, the Texas Supreme Court and the Texas Court of Criminal Appeals consolidated the Rules of Civil Evidence and the Rules of Criminal Evidence. *See* Misc. Order #97-9043 (Tex. February 25, 1998) (published at 61 TEX. B.J. 373 (1998)). The new consolidated rules do not contain language allowing juror testimony about any matter relevant to the validity of the verdict. *See* TEX. R. EVID. 606(b); *see generally* David A. Schlueter, *The New Texas Rules of Evidence: Changes Affecting Criminal Cases*, 61 TEX. B.J. 458, 459 (1998). This new rule brings Texas in line with the Federal Rules and other jurisdictions that do not allow juror testimony to impeach a verdict. *See, e.g.*, FED. R. EVID. 606(b); *Tanner v. United States*, 483 U.S. 107, 116-21 (1987).

admissible to determine if Petitioner's Constitutional rights had been violated by the improper application of the presumption of innocence and burden of proof. As such, the evidence was properly before the trial court, the Eleventh Court of Appeals, and the Texas Court of Criminal Appeals.

II. Due Process Requires Jurors to Presume Criminal Defendants Innocent and Hold the State to Its Burden of Proof Beyond a Reasonable Doubt.

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Over one hundred years ago, this Court noted that the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *See Coffin v. United States*, 156 U.S. 432, 453 (1895).

By a corollary principle to the presumption of innocence, the Constitution protects citizens accused from conviction unless the prosecuting authority "has borne the burden of producing the evidence and convincing the fact finder of his guilt." *See Speiser v. Randall*, 357 U.S. 513, 526 (1958). The Due Process Clause mandates that the prosecution's standard of proof is proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970). This standard "provides concrete substance for the presumption of innocence." *See id.* at 363. The burden of proof remains on the prosecution throughout trial and,

at least with regard to the necessary elements of the offense, never shifts to the citizen accused. *See, e.g., Patterson v. New York*, 432 U.S. 197, 215 (1977).

In accord with these bedrock principles, Petitioner was entitled to have every single juror obey the court's instructions, presume him innocent, and place the entire burden of proof on the State. Juror Fryer's testimony that she believed Petitioner "should have to prove his innocence," clearly shows that at least one juror wholly disregarded the trial court's instructions. Consequently, the uncontroverted record establishes that Petitioner did not receive a fair trial as contemplated by the Due Process Clause. *Cf. Reyna*, 846 S.W.2d at 502-03 ("If even a single juror voted guilty because of improper consideration of a defendant's failure to testify, then the defendant has been denied a fair and impartial trial.")

Juror Fryer's subsequent testimony that she "considered all the evidence" and felt that Petitioner was guilty "beyond a reasonable doubt" is meaningless – the standard of proof provides little protection without the burden being placed squarely on the state and the presumption of innocence shielding the defendant. *See, e.g., Speiser*, 357 U.S. at 526; *Winship*, 397 U.S. at 363-64.

Such blatant disregard for the trial court's instructions, and indeed two of the most fundamental principles upon which our criminal jurisprudence is founded, should not be tolerated. These fundamental principles provide little protection to the citizen accused if a conviction stands where a juror openly proclaims that she ignored the court's instructions on such basic Constitutional principles.

CONCLUSION

By affirming Petitioner's conviction despite the uncontroverted evidence establishing that a juror ignored the court's charge on the burden of proof and the presumption of innocence and instead held Petitioner to the burden of proving his innocence, the court of appeals' Opinion is clearly at odds with the well established principles espoused by this Court pertaining to the presumption of innocence and burden of proof in a criminal case. Therefore, this Court should exercise its discretionary authority to hear this case and resolve the issue of whether the Due Process Clause requires a new trial when the uncontroverted record establishes that a juror in a criminal trial did not abide the trial court's instructions concerning the Constitutionally-mandated presumption of innocence and the State's burden of proof. Petitioner therefore prays that this Court will grant this Petition and resolve this novel issue of Constitutional law.

Respectfully submitted,

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APPENDIX A

App. 1

11th Court of Appeals

Eastland, Texas

Opinion

Arnold J. Morris, Jr.

Appellant

Vs. No. 11-97-00333-CR – Appeal from Dallas County

State of Texas

Appellee

The jury convicted appellant of driving while intoxicated. The trial court assessed his punishment at 120 days confinement and a $1,000 fine. The trial court suspended the imposition of the confinement portion of the sentence and placed appellant on community supervision for 24 months. We affirm.

In his first and second points of error, appellant complains that the evidence is legally and factually insufficient to support his conviction. In reviewing claims of legal sufficiency, this court follows the standards set out in Jackson v. Virginia, 443 U.S. 307 (1979); Clewis v. State, 922 S.W.2d 126 (Tex.Cr.App.1996); and Geesa v. State, 820 S.W.2d 154 (Tex.Cr.App.1991). We must review all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a claim of factual insufficiency, we must view all of the evidence and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust Clewis v. State, supra.

Officer Boyce Wyatt testified that on June 15, 1996, at approximately 2:00 a.m., he was on patrol and that he observed appellant commit a traffic violation. Appellant failed to maintain a single lane, and his speed varied. Officer Wyatt testified that he stopped appellant; that, when he approached the vehicle, the driver's side window was rolled down; and that appellant was smoking a cigarette. Officer Wyatt asked appellant to put out the cigarette, and appellant "flipped it" toward Officer Wyatt. Officer Wyatt asked appellant to get out of his vehicle, and appellant had to use the door of the vehicle for support. Officer Wyatt testified that he could smell alcohol on appellant's breath and that he saw two cups of what appeared to be wine in the passenger's side floorboard of the vehicle. Officer Wyatt asked appellant if he had been drinking, and appellant responded that "he'd had a few."

Officer Wyatt further testified that he attempted to have appellant perform field sobriety tests. He asked appellant to say the alphabet, and appellant stopped at the letter "p" although instructed to recite the entire alphabet. Officer Wyatt again asked appellant to say the alphabet, and appellant stopped at the letter "v". Officer Wyatt attempted to have appellant perform the "walk-and-turn test"; however, while Officer Wyatt was giving appellant instructions for the test, appellant was swaying and unable to maintain his balance. Next, Officer Wyatt attempted to have appellant perform the "one-legged stand test." Officer Wyatt testified that appellant refused to perform this test. Officer Wyatt stated that appellant was "boisterous and arrogant" while attempting the field sobriety tests. Officer Wyatt placed appellant under arrest

for driving while intoxicated and put him in the patrol car.

Appellant had a passenger in his vehicle who was also placed in the patrol car. Appellant told the passenger, who was not an American citizen, that the police officers were the "Third Reich" and the "Gestapo." Appellant commented to the passenger that "[t]hat's the way we do it in this country." The passenger in appellant's vehicle was not intoxicated and was released at the police station.

Officer Wyatt testified that, at the police station, appellant was videotaped while he was read the statutory warnings detailing his constitutional rights. Appellant refused to perform field sobriety tests while being videotaped. The jury viewed the videotape, and Officer Wyatt testified that appellant did not appear as impaired on the videotape as he did at the scene. Officer Wyatt further testified on cross-examination that, on the videotape, appellant appeared to have the normal use of his mental and physical faculties.

Appellant testified at trial that at approximately 1:00 a.m. he received a call that a young man whom he had agreed to look after was stranded in Dallas. When appellant picked him up, the young man had two small cups of wine. Appellant stated that he had "two or three sips" of the wine but that he had had no other alcoholic beverages prior to that. Appellant testified that, after he was stopped, he got out of his vehicle and that the officer yelled at him to return to his vehicle. When Officer Wyatt instructed him to get out of his vehicle, appellant used

the door for assistance because he was parked at an angle.

Appellant testified that he asked Officer Wyatt if appellant could perform the "heel-to-toe-test" on a flat surface, and Officer Wyatt became "enraged." Appellant stated that Officer Wyatt was pushing him while he attempted the balance tests and that he was unable to perform the tests because he was wearing sandals and because there was gravel on the ground. Appellant further testified that he was able to recite the entire alphabet but that Officer Wyatt "raised his hand for me to stop." Appellant said that he did not refer to the police officers as the "Gestapo"; rather, he tried to calm the young man by telling him not to worry that this was not "Nazi Germany" or the "Gestapo."

Appellant points out several inconsistencies in Officer Wyatt's testimony at trial as compared to previous testimony at an administrative hearing. Appellant contends that these inconsistencies result in the evidence being legally and factually insufficient to support the verdict.

At trial, appellant impeached Officer Wyatt with the inconsistent statements. Officer Wyatt explained that at the previous hearing he did not have his full report and that some of his testimony was mistaken. Officer Wyatt testified at trial that, in his opinion, appellant was driving while intoxicated. The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. TEX. CODE CRIM. PRO. ANN. art. 36.13 (Vernon 1981). The jury views the demeanor of the witnesses

and can choose to believe all, some, or none of the testimony. Chambers v. State, 805 S.W.2d 459 (Tex.Cr.App.1991). We find that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Viewing all of the evidence, we do not find that the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Clewis v. Sate, supra. Appellant's first and second points of error are overruled.

In his third through sixth points of error, appellant complains that the trial court erred in failing to grant his motion for a new trial because the jury engaged in misconduct by considering evidence other than that offered at trial and by ignoring the court's charge on the presumption of innocence. We disagree.

In a hearing on appellant's motion for new trial, appellant called Stella Louise Brackens Fryer, a juror, to testify. Fryer testified as follows:

> Q: [By Defense Counsel] And you told us at that time that one of the things that the jury discussed and that weighed heavily against us was [appellant's] refusal to perform some tests that the police asked him to perform?
>
> A: Correct.
>
> Q: And you said kind of, by him not taking the tests, that showed you that he was guilty?
>
> A: Well, I felt like that he should have to prove his innocence. Yes, I felt like he should.
>
> Q: In fact, that's the next thing that you told me. Specifically, you said that, if he was

innocent, that he should have gone on and proved that he was innocent?

A: Yes.

Appellant contends that this testimony shows that the jury considered evidence not before it and ignored the court's charge on the presumption of innocence. Appellant argues that the jury engaged in misconduct and that he was denied a fair and impartial trial. TEX.R.APP.P 21.3(f) & (g).

The granting or denying of a motion for new trial lies within the discretion of the trial court. State v. Gonzalez, 855 S.W.2d 692, 696 (Tex.Cr.App.1993). We must determine only whether the trial court's decision was arbitrary or unreasonable. Lewis v. State, 911 S.W.2d 1 (Tex.Cr.App.1995). The trial court is the sole judge of the credibility of the testifying jurors. Lewis v. State, supra.

The jury heard evidence at trial that appellant refused to perform certain field sobriety tests. Appellant testified at trial and explained to the jury why he refused to perform the tests. The jury can consider refusal to submit to field sobriety tests as evidence. See Barraza v. State, 733 S.W.2d 379 (Tex.App. – Corpus Christi 1987), *aff'd*, 790 S.W.2d 654 (Tex.Cr.App.1990). The record does not support appellant's contention that the jury considered evidence other than that presented at trial.

Fryer's testimony at the hearing on appellant's motion for new trial shows that she considered appellant's refusal to perform field sobriety tests as evidence. See Barraza v. State, supra. Fryer further testified that she considered all of the evidence and that she believed appellant was guilty of driving while intoxicated beyond

a reasonable doubt. Appellant has not shown that the jury ignored the court's charge on the presumption of innocence. The trial court did not err in denying appellant's motion for new trial. Appellant's third through sixth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ W. G. Arnot, III
W. G. ARNOT, III
CHIEF JUSTICE

February 24, 2000

Do not publish. See TEX.R.APP.P. 47.3(b).

Panel consists of: Arnot, C.J., and
Wright, J., and McCall, J.

APPENDIX B

(LOGO)

Court of Appeals
Eleventh District of Texas
100 WEST MAIN STREET
P.O. BOX 271
EASTLAND, TEXAS 76448

[Names Omitted In Printing]

February 24, 2000

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RE: CASE NO. 11-97-00333-CR
TRIAL COURT NO. MB96-30997-H
STYLE: Arnold J. Morris, Jr.
V: State of Texas

Please be advised that this Court's former opinion and judgment dated November 4, 1999, have been withdrawn, and our opinion and judgment dated February 24, 2000, **AFFIRMING** the judgment of the trial court is substituted therefor.

We enclose a copy of the Court's opinion and judgement.

Please be advised that the appellant's motion for rehearing is **OVERRULED.**

With kindest wishes, I am.

Yours truly,

/s/ Sherry Williamson
Sherry Williamson, Clerk

SW/mk
Encls. (1) opinion
(2) judgment
cc: Hon. Elizabeth Crowder, Judge
Earl Bullock, County Clerk
Hon. Pat McDowell, Administrative Judge, Region 1

APPENDIX C

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

September 13, 2000
COA#: 11-97-00333-CR
RE: Case No. 1024-00
STYLE: MORRIS, ARNOLD J., JR.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

WILLIAM REAGAN WYNN
ATTORNEY AT LAW
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STE 300
FORT WORTH TX 76102